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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-1683

FIRST BEVERAGES, INC. OF LAS VEGAS, et al., Petitioners,

vs.

ROYAL CROWN COLA CO., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

W. Lee McLane, Jr.
Nola McLane
2970 Valley Center
Phoenix, AZ 85073
(602) 254-5346
Attorneys for First Beverages, Norton Packaging and Norton

Ronald William Reagin
10960 Wilshire Blvd.
Los Angeles, CA 90024
(213) 478-2506
Attorney for H & M Sales and Mae-Con

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FIRST BEVERAGES, INC. OF LAS VEGAS, et al., Petitioners,

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ROYAL CROWN COLA CO., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, First Beverages, Inc. of Las Vegas, Norton Packaging, Inc. of Arizona, Will Norton, H & M Sales Co., Inc., and Mae-Con Enterprises, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 30, 1980. Petitioners, all the plaintiffs and the counter-

defendant in two cases which were consolidated for all purposes below, are listed together in one caption pursuant to Rule 23(5).

OPINION BELOW

The opinion of the Court of Appeals (Appendix A) is not yet reported. The District Court wrote no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), "impliedly" held, as the Court of Appeals

below ruled, that the vertical territorial restraints imposed by the soft drink companies on their dealers which totally eliminate intrabrand competition must be tested for legality under Section 1 of the Sherman Act under the rule of reason only, or held, as the Seventh and Tenth Circuits and the Federal Trade Commission decided, that particular applications of vertical restrictions may, based upon demonstrable economic effect, justify per se prohibition under Northern Pac. R. Co. v. United States, 356 U.S. 1 (1958)?

2. Where plaintiffs in a private antitrust suit carried their burden of proving that a defendant's vertical territorial restraint was per se unreasonable under the passage of title test set forth in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), and during an appeal from the trial court's refusal to instruct the jury that the restraint was per se unreasonable

the Supreme Court of the United States changed the law in Sylvania by overruling Schwinn's passage of title test and imposed a changed burden of proof requiring that plaintiffs prove, based upon demonstrable economic effect, that the restraint was per se unreasonable under Sylvania and Northern Pac., does the rule of United States v. Schooner Peggy, 5 U.S. (1 Cranch.) 103, 109, and its progeny require that such intervening change in the law must be applied in pending litigation and that petitioners, who assert that Royal Crown's restraint is, based upon demonstrable economic effect, per se unreasonable under Sylvania and Northern Pac., be afforded an opportunity to carry this changed and retroactively imposed burden of proof?

3. Did Sylvania set forth some of the relevant factors to be considered by future juries in determining the reasonableness or unreasonableness of vertical territorial

restraints under the rule of reason, as held by the Fifth Circuit in Dougherty v. Continental Oil Co., 579 F.2d 954, 960 (5th Cir. 1978), and by the Federal Trade Commission In the Matter of the Coca-Cola Co., No. 8855 (F.T.C. April 25, 1978), Trade Reg. Rep. (CCH) Supp. No. 330, or, as held by the Court of Appeals herein, add nothing specific whatever to the rule of reason?

4. Assuming arguendo that the Fifth Circuit and the Federal Trade Commission were correct in interpreting Sylvania to mean that the specific factors referred to in Sylvania as relevant to a determination of reasonableness or unreasonableness of a vertical territorial restraint under the rule of reason should be focused on by future juries, are petitioners entitled to a new trial under the doctrine that an intervening change in the law governs in pending litigation, as held in Bradley v. Richmond

School Bd., 416 U.S. 696 (1974); Hamling v. United States, 418 U.S. 87 (1974); and United States v. Schooner Peggy, 5 U.S. (1 Cranch.) 103?

5. Assuming arguendo that the Supreme Court of the United States in Sylvania did not refer to specific criteria to be considered when future juries test a vertical territorial restraint under the rule of reason and intended to leave factfinders with nothing more than the statement of the rule of reason in Chicago Board of Trade v. United States, 246 U.S. 231 (1918), should the Court acknowledge such resultant formlessness and lack of content of the latter rule and establish some criteria for restricted distribution cases under the rule of reason?

6. Under the rule of Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951), which prohibits the doctrine of unclean hands as a defense in a private

antitrust suit, may the defendant nonetheless introduce unclean hands evidence to prove that there are no damages, an important element in the cause of action itself?

7. Under the rule of Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), which prohibits the doctrine of in pari delicto as a defense in a private antitrust suit, may the defendant nonetheless introduce in pari delicto evidence on the ground that its motive is to show that a vertical territorial restraint is reasonable under the rule of reason?

8. Where a jury is never asked for actual or compensatory damages, is asked by a counterclaimant for nominal damages only, is instructed by the trial court that the counterclaimant seeks only nominal damages in a specified amount and that it cannot award damages in a greater amount, and then that jury returns a verdict for the precise amount of nominal damages requested, may a

Court of Appeals properly rule that the jury did not return a verdict for nominal damages but one for actual damages in a nominal amount?

9. Assuming arguendo that a Court of Appeals cannot properly convert a verdict for nominal damages into something called a verdict for actual damages in a nominal amount, do the Clayton and Sherman Acts require in a private antitrust action that there must be injury and damages and there can be no recovery unless compensatory or actual damages are proved, and therefore the right to nominal damages does not exist in a private antitrust action?

STATUTORY PROVISIONS INVOLVED

The applicable portions of 15 U.S.C. §§ 1-7 and 12-27 are set forth in Appendix B.

STATEMENT OF THE CASE

Petitioners' causes of action are based on Section 1 of the Sherman Act and Section 4 of the Clayton Act. These causes asserted that Royal Crown imposed and enforced against its dealer First Beverages a vertical territorial restraint of trade which was unreasonable and therefore illegal within the meaning of Section 1 of the Sherman Act. That restraint absolutely prohibited each of Royal Crown's dealers from selling Royal Crown products to persons located outside of the exclusive specifically designated geographical area assigned to each dealer. Specifically, petitioners asserted that Royal Crown terminated syrup and canned soft drink sales to First Beverages, its Las Vegas dealer, in order to prevent First Beverages and other petitioners from fulfilling purchase orders for 800,000 cases of soft drinks from a Los Angeles grocery

chain.

Royal Crown counterclaimed, asserting that its restraint was reasonable under Section 1, that therefore petitioners' sales and shipments of Royal Crown soft drinks from Las Vegas to the Los Angeles grocery chain constituted a conspiracy in restraint of its trade which violated Section 1 of the Sherman Act, and that it was entitled to nominal damages therefor.

Prior to the 1976 trial, petitioners proved in several motions that Royal Crown passed title to its products to First Beverages, and that therefore the restraint was per se unreasonable under United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). However, the district court refused to so hold. Therefore, at trial the petitioners not only asserted that the said per se rule was applicable, but in the alternative also asserted that the restraint was unreasonable under the rule of reason set

forth in Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). With respect to the per se unreasonable argument, evidence was admitted that title to Royal Crown's products passed to First Beverages. No evidence to the contrary was offered or admitted. Petitioners also, after unsuccessfully attempting to understand what was the specific content of the rule of reason set forth in Chicago Board of Trade and what was the criteria set forth therein to determine the reasonableness of Royal Crown's vertical territorial restraint,* submitted evidence which they hoped would be relevant to prove that the restraint was unreasonable under Chicago Board of Trade.

In pretrial proceedings and during the trial the district court also made several rulings concerning the meaning of the rule

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* See Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U. of Chi. L. Rev. 1 (1977).

of Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951), prohibiting the unclean hands defense in an antitrust suit, the meaning of the rule of Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), barring the in pari delicto defense in antitrust suits, and the issue of whether a right to nominal damages exists in an antitrust suit.

At the close of the trial, the district court refused to apply Schwinn's passage of title test and instruct the jury that Royal Crown's restraint was per se unreasonable, ruled that it adopted the rule of reason as the governing standard, and gave the following portion of the Chicago Board of Trade rule of reason statement as its jury instruction:

> "In determining whether or not a particular restraint is reasonable or unreasonable, and therefore that it is or is not a violation of the antitrust

laws, you may consider:

First, the nature of the particular industry involved;

Second, facts which are peculiar to the business in which the restraint is applied;

Third, the nature of the restraint and its effect, actual and probable, upon soft drink bottlers and upon consumers;

Fourth, the history of the restraint;

Fifth, the reasons for adopting the practice."

(R.T. 5389-5390).

The jury returned verdicts denying the petitioners' antitrust claims and returned separate verdicts awarding Royal Crown the requested nominal damages against petitioners.

Following the jury verdicts and judgments in favor of Royal Crown, petitioners appealed to the U.S. Court of Appeals for the Ninth Circuit. During the pendency of the appeal,

the Supreme Court of the United States decided Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). That latter decision overruled Schwinn's passage of title test for per se unreasonableness, held that particular applications of vertical restrictions may justify per se prohibition if based upon demonstrable economic effect, and set forth several specific criteria to be applied if a vertical restriction was to be tested under the rule of reason.

The Court of Appeals, as set forth infra, refused to order a new trial based on the intervening changes in the law or errors by the district court, and affirmed the award to Royal Crown of nominal damages. The grounds given by the Court of Appeals for its refusal are set forth in Numbers 1 through 4 of the Reasons For Granting The Writ and in Appendix A.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN CONTINENTAL T.V., INC. V. GTE SYLVANIA, INC., 433 U.S. 36 (1977), AND WITH THE DECISIONS OF THE SEVENTH AND TENTH CIRCUITS IN GENERAL BEVERAGE SALES CO. V. EAST-SIDE WINERY, 568 F.2d 1147 (7th Cir. 1978), AND LAMP LIQUORS, INC. V. COORS CO., 563 F. 2d 425 (10th Cir. 1977), HOLDING THAT, BASED UPON DEMONSTRABLE ECONOMIC EFFECT, PARTICULAR APPLICATIONS OF VERTICAL RESTRICTIONS MAY JUSTIFY PER SE PROHIBITION, AND THAT AN ANTITRUST SUIT PLAINTIFF SHOULD BE AFFORDED AN OPPORTUNITY TO PROVE THAT THE PARTICULAR APPLICATION CHALLENGED JUSTIFIES PER SE TREATMENT.

The Court of Appeals opinion herein recognizes that under United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), Royal Crown's vertical territorial restraint was per se unreasonable, and that at the time of the 1976 trial the district court erred when it ruled otherwise. The Court of Appeals also correctly notes that this particular error has been rendered harmless by the overruling of Schwinn's passage of title test during

the pendency of the appeal by Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). The reason, of course, is that an intervening change in the law must be applied in litigation still pending. United States v. Schooner Peggy, 5 U.S. (1 Cranch.) 103; Bradley v. Richmond School Bd., 416 U.S. 696 (1974); Hamling v. United States, 418 U.S. 87 (1974).

However, having properly applied the Sylvania intervening change in the law in pending litigation to cure the district court's earlier error respecting Schwinn, the Court of Appeals was also bound to apply all of Sylvania. Specifically, Sylvania also required the Court of Appeals to remand petitioners' per se unreasonable claim for a new trial so that they would be afforded an opportunity to prove, as they assert, that under the new standard set out in Sylvania, Royal Crown's restraint is per se unreasonable under Northern Pac. R. Co.

v. United States, 356 U.S. 1 (1958), and Sylvania.

Sylvania overruled the passage of title test in Schwinn as follows:

> "Accordingly, we conclude that the per se rule stated in Schwinn must be overruled. In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition under Northern Pac. R. Co. But we do make it clear that departure from the rule of reason standard must be based upon demonstrable economic effect..." 433 U.S. at 57. (Emphasis supplied).

Relying on this language, the Seventh Circuit in General Beverage Sales Co. v. East-Side Winery, 568 F.2d 1147, 1154 (7th Cir. 1978), remanded a case for retrial wherein the defendant had also imposed a vertical restriction upon its dealers by limiting their sales of wines and brandies to

specifically designated geographical areas. The opinion recognized that as a result of Sylvania, the restraint was no longer per se unreasonable under the passage of title test in Schwinn, but went on to rule:

> "On remand, however, plaintiff should be afforded the opportunity to prove that this particular type of vertical restriction justifies per se prohibition 'based upon demonstrable economic effect.' "
>
> 568 F.2d at 1154.

The Tenth Circuit agrees with the Seventh Circuit. In Lamp Liquors, Inc. v. Coors Co., 563 F.2d 425 (10th Cir. 1977), the opinion states:

> "We have noted above that the district court ruled that absent the alleged violation of liquor laws of Wyoming by Lamp Liquors, there would be an antitrust violation. The court was, of course, thinking of a per se

violation based on the vertical restraint of trade practiced by Coors. Since, however, there has been an intervening change of the law in per se violations as a result of the Supreme Court's decision in Continental T.V., Inc. v. GTE Sylvania Inc., supra, the district court will be called on to consider, assuming that the plaintiff contends that there is nevertheless a per se violation, whether the alleged vertical restraint which prevents Lamp Liquors from selling to persons for out-of state resale has an effect of such magnitude on competition and lack of redeeming value that a per se illegality rule should apply under GTE Sylvania, Inc., supra; Northern Pacific R. Co. v. U.S., 356 U.S. 1, 5...(1958); and White Motor Co. v. U.S., 372 U.S. 253...(1963)."

563 F.2d at 431-432.

However, despite petitioners' contention that there is nonetheless a per se violation, the Court of Appeals has refused to afford petitioners an opportunity to prove that Royal Crown's restraint, based upon demonstrable economic effects, justifies per se prohibition. Its rationale is that Sylvania "impliedly held that vertical territorial restrictions such as those involved in the case before us must be analyzed under the rule of reason" only.

Sylvania did not so hold. Rather, it explicitly rejected such an interpretation when it stated in overruling Schwinn that it did "not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition under Northern Pac. R. Co." Sylvania, 433 U.S. at 57. This language recognizes not only that the particular application of a vertical restriction which absolutely prohibits intrabrand competition, as does

Royal Crown's, may, based upon demonstrable economic effects, justify per se prohibition, but that even the Sylvania type of vertical restraint which did not foreclose intrabrand competition might justify per se prohibition based upon demonstrable economic effects.

Nor does the Federal Trade Commission agree with the Court of Appeals decision here that Sylvania prohibits a per se analysis of the cola company restraints when based upon demonstrable economic effects. Before ruling that the vertical territorial restraints used by Coca-Cola and Pepsi-Co., which are identical to Royal Crown's, are unreasonable under the rule of reason criteria set forth in Sylvania, the Federal Trade Commission concluded that on the facts before it, the restraint was not per se unreasonable under Sylvania and Northern Pac. The opinion stated that such a decision on the per se issue was necessary because:

"In the aftermath of GTE, Topco-type market division agreements among competitors clearly remain per se illegal (GTE, supra at 71,901 fn. 28), while supplier-imposed vertical territorial restrictions must generally be policed under the rule of reason unless it can be demonstrated that, in a particular situation, they typically have or are likely to have a 'pernicious effect on competition' and that they 'lack ... any redeeming virtue ...' (Id at 71,902).

Under the court's most recent pronouncement, then, the first step in evaluating these restraints is to classify them as horizontal or vertical. ...

2. Vertical Per Se Theories

As we mentioned previously, the Supreme Court, in overruling Schwinn, has not entirely rejected the

possibility that vertical restrictions may, in individual cases, be declared per se unlawful, but it has toughened the standard considerably. Only those restraints found to be 'pernicious' and without 'any redeeming virtue' now justify per se treatment. The types of competitive situations, other than price fixing, which may meet this standard are unclear, but beyond that, the trier of fact and appellate tribunals must be receptive to the fact that situations may exist in which the imposition of a vertical restraint may, under GTE, still be per se unlawful."

In the Matter of the Coca-Cola Co., No. 8855 (F.T.C. April 25, 1978) Trade Reg. Rep. (CCH) Supp. No. 330. (Emphasis supplied).

The Court of Appeals decision here clearly is in conflict with the decision

in Sylvania, and for that reason alone should be reviewed. However, assuming arguendo it was not, it certainly is in conflict with the above cited decisions of the Seventh and Tenth Circuits and should be reviewed so that the lower courts will know which of these conflicting views should be applied in vertical territorial restraint cases. The same is true with respect to the Federal Trade Commission decision in the Coca-Cola case. Also, it is clear that this Court's views concerning fair play and due process require that a litigant who successfully carried his burden of proving a restraint per se unreasonable under the law applicable at the time of the trial should be afforded an opportunity to carry the new burden of proof imposed after that trial but while the litigation is still pending. To this date no jury or court has ever ruled on the per se issue under Sylvania.

2. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN SYLVANIA, THE DECISION OF THE FIFTH CIRCUIT IN DOUGHERTY V. CONTINENTAL OIL CO., 579 F.2d 954, 960 (5th Cir. 1978), AND WITH THE OPINION OF THE FEDERAL TRADE COMMISSION IN THE MATTER OF THE COCA-COLA CO., No. 8855 (F.T.C. APRIL 25, 1978) TRADE REG. REP. (CCH) SUPP. No. 330, HOLDING THAT SEVERAL SPECIFIC CRITERIA SHOULD BE FOCUSED ON WHEN THE FACTFINDER DETERMINES REASONABLENESS OR UNREASONABLENESS OF A VERTICAL TERRITORIAL RESTRAINT UNDER THE RULE OF REASON; AND ASSUMING THAT THE SUPREME COURT DID NOT CAST ADDITIONAL LIGHT ON THE CRITERIA TO BE APPLIED UNDER THE RULE OF REASON IN TESTING THE LEGALITY OF RESTRICTIONS ON DISTRIBUTIONS AND SIMPLY REPEATED THE LANGUAGE OF THE RULE OF REASON SET FORTH IN CHICAGO BOARD OF TRADE V. UNITED STATES, 246 U.S. 231 (1918), THE FORMLESSNESS AND LACK OF CONTENT OF SUCH STATEMENT OF THE RULE OF REASON SHOULD BE REMEDIED.

Petitioners submit that aside from its overruling of Schwinn's passage of title test in determining per se unreasonableness of a vertical territorial restraint, Sylvania was important in that it filled part of a troublesome void in restricted

distribution cases under Section 1 of the Sherman Act. Specifically, the opinion gave content to the rule of reason stated in Chicago Board of Trade v. United States, 246 U.S. 231 (1918), by specifying some of the criteria to be focused on in determining whether a vertical restraint was reasonable or unreasonable under the rule of reason. Hence, following Sylvania, the Fifth Circuit and the Federal Trade Commission, the latter in determining that the very restraint involved here was unreasonable under the rule of reason, each required that the attention of the fact-finder be focused on these specific criteria in applying the rule of reason to a vertical restraint. Thus, in Dougherty v. Continental Oil Co., 579 F.2d 954, 960 (5th Cir. 1978), the Fifth Circuit reversed and remanded a vertical territorial restraint case tried prior to Sylvania where a rule of reason analysis contained

in an interrogatory was rendered deficient by Sylvania because the latter:

> "... suggested that future juries evaluating vertical territorial restrictions should consider whether the decrease in intrabrand competition caused by the restriction was offset by an increase in interbrand competition. 433 U.S. at 54, ... The jury's attention was not focused on this critical factor."

And in the Federal Trade Commission's exhaustive analysis prior to concluding that the Coca-Cola and Pepsi-Co. vertical territorial restraints were unreasonable under the rule of reason, the opinion not only reviewed the above referred to specific criterion from Sylvania but several others set forth in Sylvania as criteria in judging restricted distribution cases. In the Matter of the Coca-Cola Co., No. 8855 (F.T.C. April 25, 1978), Trade

Reg. Rep. (CCH) Supp. No. 330. Indeed the Coca-Cola opinion is virtually a blue print of the specific factors which Sylvania thought important to weigh when determining whether a cola company restraint is reasonable or unreasonable under the rule of reason.

In the instant case the jury's attention was not focused on any of these criteria because Sylvania was not handed down until after the trial was completed and appeal proceedings were pending. Hence, under the old rule that intervening changes in the law govern in pending litigation, petitioners are entitled to a new trial so that evidence may be introduced as to these factors and the jury's attention focused thereon by proper instructions. Schooner Peggy, 5 U.S. (1 Cranch.) at 109; Bradley v. Richmond School Board, 416 U.S. 696; Hamling, 418 U.S. at 102.

The Court of Appeals ruled that the

rule of reason instruction given here, drawn from Chicago Board of Trade, was sufficient and that Sylvania does not require the jury's attention to be directed to the specific content assigned to the rule of reason in restricted distribution cases by Sylvania. The Court of Appeals decision is thereby in conflict with the Fifth Circuit's decision in Dougherty and the opinion of the Federal Trade Commission in the Coca-Cola case, and gives strong support to the assertion by Professor Posner that, in restricted distribution cases, Sylvania added nothing to the formlessness and lack of content of Chicago Board of Trade's statement of the rule of reason. Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U. of Chi. L. Rev. 1, 14-16 (1977).

Petitioners have already suggested that since the Supreme Court thought that

several additional criteria in determining the reasonableness of a vertical restraint were important enough to overrule a precedent only 10 years old, it should follow that the Supreme Court also thought that future factfinders should receive evidence on those criteria and be instructed as to their relevance.

One writer does not agree. Posner, supra. Professor Posner suggests that Sylvania did nothing to add content to the Rule of Reason in restricted distribution cases. He states that: "The content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability." Id at 14. He adds that Chicago Board of Trade's effort to provide content to the Rule of Reason "is not a helpful formulation," and that "to be told to look to the history, circumstances, purposes, and effects of a challenged restriction is not to be provided with usable

criteria of illegality." Id at 15. Finally, Posner states that: "The Rule of Reason in its present state is a poor guide to the decision of restricted distribution" cases, and its "formlessness is clearly conveyed by the American Bar Association's recent monograph on restricted distribution." Id at 16.

Therefore, assuming that Professor Posner and the Court of Appeals for the Ninth Circuit are correct and the Supreme Court did not in Sylvania shed further light on the criteria to be applied under the rule of reason to restricted distribution cases, the need to do so is clear. Plaintiffs, defendants, lawyers, trial judges, juries, and law professors need something more than abstractions devoid of criteria if they are to determine rationally whether a vertical territorial restraint is reasonable or unreasonable under the rule of reason. The need to do so in the instant case

is illustrated by the fact that when the Federal Trade Commission applied the rule of reason, as explained in Sylvania, to the same vertical restraint involved here, it decided the restraint was unreasonable under the rule of reason, but when the jury here was given the Chicago Board of Trade abstractions only, it found the restraint reasonable.

Because trial and intermediate appellate courts should know whether or not the factfinder's attention should be focused on the criteria set forth in Sylvania when determining if a vertical territorial restraint is reasonable under the rule of reason and because the Court of Appeals decision here is in conflict with the opinions of both the Fifth Circuit and the Federal Trade Commission, certiorari should be granted.

3. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN KIEFER-STEWART CO. v. JOSEPH E. SEAGRAM & SONS, 340 U.S. 211, HOLDING THAT UNCLEAN HANDS IS NOT AN ALLOWABLE DEFENSE IN AN ANTITRUST ACTION, AND IN PERMA LIFE MUFFLERS, INC. v. INTERNATIONAL PARTS CORP., 392 U.S. 134, HOLDING THAT THE DOCTRINE OF IN PARI DELICTO IS NOT TO BE RECOGNIZED AS A DEFENSE TO AN ANTITRUST ACTION.

"Unclean hands refers to the plaintiff's wrongdoing against a third party with respect to the subject matter of the suit." Memorex Corp. v. I.B.M. Corp., 555 F.2d 1379 (9th Cir. 1977). Unclean hands is not an allowable defense in an antitrust action. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951). Such rule is "premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever present threat to deter anyone contemplating business behavior in violation of the antitrust laws." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134,

139 (1968). Such defenses have "no place in a treble-damage antitrust action." Id at 148 (concurring opinion of J. Marshall). The reasons for the rule also include "the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes." Id at 138. The Court of Appeals here has not obeyed this rule.

Royal Crown submitted a jury instruction to the effect that petitioners' trucking arrangements for the transfer of Royal Crown soft drinks from Las Vegas to Los Angeles may have violated Interstate Commerce Commission regulations. (R. 1311, 1366). After petitioners moved to strike such defense, Royal Crown argued that such evidence was relevant to "whether there is a legally cognizable cause of action", and was important because:

> "If by legal business activity plaintiffs could not have competed

> in the Los Angeles market, the jury could decide that Royal Crown's territorial franchise system does not unreasonably restrain trade since it does not operate to prohibit competition which would otherwise occur." (R. 1549-1554; R. 1589 at 5-9, 1632 at 9-16). (Emphasis supplied).

Hence, Royal Crown conceded, before the jury ever heard such evidence, that a group of lay persons could be influenced by such evidence to conclude that Royal Crown's restraint was reasonable under the rule of reason, and that petitioners therefore had no cause of action. In addition, Royal Crown argued that such evidence should be admitted to eliminate damages or reduce damages, arguing that the I.C.C. might have stopped such trucking arrangements, that the costs of shipping would thereby increase, that petitioners' profits would thereby be eliminated or reduced, and that damages

would be similarly affected. (R. 1311, 1366; R. 1589 at 5-9, 1632 at 9-16). The courts below ruled that the evidence was admissable on the issue of the amount, if any, of damages. (R. 5396-5397).

Royal Crown then told the jury the trucking arrangements were analogous to hiring child labor at fifty cents an hour, and argued that the damages asserted would be eliminated entirely or reduced as a result of such evidence. (R.T. 3185).

Little imagination is required for a lawyer to think of several reasons why some act constituting unclean hands has occurred and is conceivably related to whether there are damages in an antitrust action. If that is all that is required to nullify Kiefer-Stewart (unclean hands), as the Court of Appeals ruled here, then the intellectual investment committed to that case was not worth the effort. If Kiefer-Stewart is that empty of content, it should be overruled so

that prospective antitrust litigants can make realistic judgments about the merits of a particular case. But if Kiefer-Stewart means what it says, the Courts of Appeals ought to be required to follow it.

Furthermore, damages go to the extent of the antitrust injury, an important element in the cause of action itself. Therefore, use of unclean hands or illegality evidence to eliminate or reduce damages is equivalent to its use as an affirmative defense.

Thus, the Court of Appeals' decision sustaining the use of unclean hands evidence here, on the ground that it was not used as a "complete affirmative defense," defeats the substance and spirit of Kiefer-Stewart. To rule that evidence of unclean hands is admissable to prove there are no damages hardly squares with the view that such defense has "no place in a treble damage antitrust action." Perma Life, 392 U.S. at 148.

Royal Crown, similarly succeeded in reducing to the consistency of tapioca pudding the Supreme Court's ban on in pari delicto in antitrust suits. Perma Life, 392 U.S. at 140, held that "the doctrine of in pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."

The Court of Appeals acknowledged here that Royal Crown asserted such in pari delicto defense in its Pretrial Memorandum, argued in defense thereof that Perma Life did not bar such defense based on petitioners' "truly complete involvement and participation" in Royal Crown's vertical territorial restriction, resisted petitioners' motions to strike the defense, introduced evidence to show that petitioners First Beverages and Will Norton were involved and participated in such restriction, and argued to the jury respecting such evidence. Nonetheless, it

held that Royal Crown did not make an in pari delicto defense because Royal Crown's "purpose" in offering such evidence was to show thereby that the vertical restraint was reasonable under the rule of reason.

Thus, the Court of Appeals has ruled that Perma Life's prohibition of in pari delicto does not matter if the "purpose" of an antitrust defendant in offering the evidence of participation and involvement is to challenge the heart of plaintiff's cause of action, i.e. that the disputed vertical restriction is unreasonable under the rule of reason. If so, then Perma Life is easier to kill than Kiefer-Stewart.

Surely it is plain that both the rule and the intent of Perma Life are not being complied with when a Court of Appeals so reasons.

The decision of the Court of Appeals is in conflict with Kiefer-Stewart and Perma Life.

4. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SEVENTH AND EIGHTH CIRCUITS IN TURNER GLASS CORPORATION v. HARTFORD-EMPIRE CO., 173 F.2d 49 (7th Cir. 1949) AND AMERICAN CAN CO. v. RUSSELLVILLE CANNING CO., 191 F.2d 38 (8th Cir. 1951), HOLDING THAT THE RIGHT TO NOMINAL DAMAGES IN AN ANTITRUST SUIT DOES NOT EXIST.

Under Section 4 of the Clayton Act and Section 1 of the Sherman Act, Royal Crown counterclaimed against each petitioner asserting that its vertical restraint was reasonable under the rule of reason and that therefore it was a violation of Section 1 of the Sherman Act for petitioners to conspire to disrupt the Los Angeles and Las Vegas franchise arrangements by selling and shipping Royal Crown soft drinks into the Southern California area.

However, at the trial, after failing to even mention its antitrust counterclaims to the jury in its opening statement (R.T. 74-86), Royal Crown explicitly told the jury, the petitioners and the district court

that it sought only nominal damages of $500 against each petitioner for its asserted antitrust claim.* The district court instructed the jury that Royal Crown "seeks only nominal damages for $500 from the plaintiffs," and "you may not award a greater amount." (R.T. 5400). Subsequently, the jury returned the requested verdicts of $500 against each petitioner on the antitrust counterclaim. Later, the district court awarded Royal Crown $10,000 in attorney's fees for the recovery of the nominal damages of $500. (C.R. 1881-1883, 1970-1973).

Thus, the jury was never asked to return a verdict of actual damages, was asked for nominal damages only, was instructed by the district court that it was forbidden to return a verdict other than for the

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* "We are only asking for nominal damages just to emphasize the point, and his Honor will instruct you that is the maximum that can be awarded."
Royal Crown's closing statement to the jury. (Emphasis supplied) (R.T. 5328-5329).

nominal damages sought, and subsequently returned verdicts for the precise amount of nominal damages sought.

Nominal damages are given not as an equivalent for the wrong, but in recognition of a technical injury and by way of declaring a right; they are not the same as damages small in amount. Danker v. Iowa Power & Light Co., 249 Iowa 327, 86 N.W. 2d 835, 847; Hysinger v. Mullinax, 204 Tenn. 181, 319 S.W. 2d 79, 82; McCormick on Damages §21 (1935). Such damages are in contradistinction to actual or compensatory damages. Price v. McComish, 22 C.A. 2d 92, 70 P.2d 978, 982. Nominal damages are damages which exist in name only, and not in fact or in amount; they are the same as no damages at all. Fairfield v. American Photocopy Equipment Co., 138 C.A. 2d 82, 291 P.2d 194, 198; Price; McGrew Mach. Co. v. One Spring Alarm Clock Co., 124 Neb. 93, 245 N.W. 263, 266.

Since, under Section 4 of the Clayton Act, "without actual damages to plaintiff, there can be no recovery," Turner Glass Corporation v. Hartford-Empire Co., 173 F.2d 49, 52 (7th Cir. 1949) and there cannot be recovery unless compensatory damages are awarded, American Can Co. v. Russellville Canning Co., 191 F.2d 38, 54 (8th Cir. 1951), the right to nominal damages in an antitrust suit does not exist. Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440, 449 (ED Pa. 1960).

Hence, the decision of the Court of Appeals herein, affirming the award of nominal damages in an antitrust suit and the allowance of $10,000 in attorney's fees for recovery thereof, conflicts with the above decisions of the Seventh and Eight Circuits.

Nor can the rationale of the Court of Appeals' opinion here avoid the foregoing conflicts among the Circuits. That rationale

itself is in conflict with principles enunciated by the Supreme Court. The opinion states that because the district court also instructed the jury that Royal Crown must show that the antitrust violation proximately caused some actual injury to its business or property, the district court really instructed the jury that it could only return a verdict for actual damages in a nominal amount, and that the jury must be presumed to have followed this latter instruction.

Aside from the Orwellian cloud accompanying such a process of reasoning, (white is really black and nominal is really actual), and that it ignores completely the fact that Royal Crown noticed the opposing parties in this litigation that it sought only nominal damages, it is in conflict with both the record here and principles enunciated by the Supreme Court.

First, since the jury is presumed to

have followed the instruction to it, and it was instructed that Royal Crown "seeks only nominal damages of $500 from the plaintiffs" and "you may not award a greater amount," it follows that the jury could not have returned actual damages of $500.

Next, the said reasoning assumes that a finding that there is actual injury encompasses a finding that there are actual damages. Yet Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 488-489, makes clear that there must be injury and damage within the meaning of Section 4 of the Clayton Act. Part of a plaintiff's burden of proof is to show monetary damages which have been actually sustained. Therefore, a finding that an antitrust violation proximately caused actual injury to business or property does not include a finding that such injury resulted in monetary damages. Thus, it cannot be reasoned that an instruction to a jury that Royal

Crown is required to show that an anti-trust violation proximately caused actual injury to its business or property means that the jury must have determined that actual monetary damages resulted therefrom, especially when the jury was also instructed that Royal Crown "seeks only nominal damages of $500" and "you may not award a greater amount."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

W. Lee McLane, Jr.
Nola McLane
2970 Valley Center
Phoenix, AZ 85073
Attorneys for First Beverages, Norton Packaging and Norton

Ronald William Reagin
10960 Wilshire Blvd.
Los Angeles, CA 90024
Attorney for H & M Sales and Mae-Con

April 10, 1980

(APPENDIX A AND B IN SEPARATE VOLUME)

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-1683

FIRST BEVERAGES, INC. OF LAS VEGAS, et al., Petitioners,

vs.

ROYAL CROWN COLA CO., Respondent.

APPENDIX A AND B TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

W. Lee McLane, Jr.
Nola McLane
2970 Valley Center
Phoenix, AZ 85073
(602) 254-5346
Attorneys for First Beverages, Norton Packaging and Norton

Ronald William Reagin
10960 Wilshire Blvd.
Los Angeles, CA 90024
(213) 478-2506
Attorney for H & M Sales and Mae-Con

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APPENDIX A

(FILED JANUARY 30, 1980)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIRST BEVERAGES, INC. OF LAS VEGAS, a Nevada corporation, and NORTON PACKAGING, INC. OF ARIZONA, an Arizona corporation, Plaintiffs-Appellants, and WILL NORTON, Counter-Defendant-Appellant, vs. ROYAL CROWN COLA CO., a Delaware corporation, and ROYAL CROWN BEVERAGE CO., etc., et al., Defendant-Appellees.	No. 77-3536
H & M SALES CO., INC. and MAE-CON ENTERPRISES, INC., Plaintiffs-Appellants, vs. ROYAL CROWN COLA CO., et al., Defendant-Appellants.	No. 78-1050

OPINION

Appeal from the United States District Court for the Central District of California

Before: CHOY and TANG, Circuit Judges, and FOLEY,* District Judge.

CHOY, Circuit Judge:

Appellants filed suit contending that Royal Crown Cola Co.'s vertically-imposed territorial market restrictions violated §1 of the Sherman Antitrust Act. Royal Crown responded that its exclusive territorial trademark licensing system was lawful and filed breach of contract and antitrust counterclaims against appellants.

The jury found in Royal Crown's favor on appellants' claims and on the counterclaims. We affirm.

I. Statement of the Case

Royal Crown is a well-established soft drink manufacturer. It sells soft drink concentrate to its bottlers, who mix the concentrate with sugar and water, add carbonate gas, and bottle the resulting soft drink, all according to strict standards imposed by Royal Crown. The bottlers normally then sell the bottled soft drinks to retail outlets. There generally are no intermediaries in the distribution chain between the bottlers and the retail outlets.

The bottlers also distribute canned soft drinks, but do not manufacture

*The Honorable Roger D. Foley, United States District Judge for the District of Nevada, sitting by designation.

them. Royal Crown supplies all the raw products for canned soft drinks to contract canners such as Norton Packaging. The canners produce the finished canned drinks and are paid for their services on a volume basis. The title to the cans and their contents at all times remains with Royal Crown. Royal Crown sells the finished canned soft drinks to its licensed bottlers for distribution.

During 1969 and 1970, First Beverages, Inc. was a licensed bottler of Royal Crown. Its licensing agreements with Royal Crown gave it the right to purchase soft drink concentrate, to manufacture bottled soft drinks and to sell bottled and canned soft drinks under Royal Crown's trademarked names in a "restricted" territory. The restricted or exclusive territory assigned to First Beverages was the Las Vegas, Nevada area.

Bottlers such as First Beverages are not allowed to sell Royal Crown products outside of their exclusive territories. This eliminates intrabrand competition. Apparently all major soft drink manufacturers use similar exclusive license distribution schemes. See In the Matter of the Coca-Cola Co., No. 8855 (F.T.C. April 25, 1978), Trade Reg. Rep. (CCH) Supp. No. 330; In the Matter of PepsiCo, Inc., No. 8856, id. However, the FTC has recently declared that Coca-Cola Co.'s and PepsiCo's territorial distribution restrictions are unlawful, insofar as they apply to distribution of soft drinks in non returnable containers. Id.[1]/

A. Central Warehousing

In recent years, there has been a

trend in the retail grocery industry toward developing central warehouse distribution systems. In a central warehousing system, a grocery chain or cooperative grocery-buying association buys goods in large lots from manufacturers and suppliers. The goods are delivered to a central warehouse by the manufacturer or supplier. From there, trucks belonging to the chain or cooperative haul the goods to individual retail stores.

Such a system benefits the chains and cooperatives. They pay less for the products than they would if the supplier made delivery to individual stores. Also, they can consolidate deliveries from the warehouse to individual stores. Thus, their savings due to buying in large lots and arranging for central delivery are greater than their added delivery costs.

Many grocery chains and cooperatives operate central warehouses in the Los Angeles/Orange County, California area. These central warehouses serve wide geographic areas, including some stores in the Las Vegas area.

B. Sales to Operators of Central Warehouses

1. The Los Angeles Royal Crown Bottler

In the mid-1960's, the Los Angeles Royal Crown bottler began selling and delivering soft drinks to central warehouses in the Los Angeles/Orange County area, an area within its exclusive selling territory. Soft drinks from those warehouses were delivered into the exclusive territories of other Royal Crown bottlers, including First Beverages' Las Vegas territory.

The bottlers into whose areas the Southern California central warehouses were delivering complained to the Los Angeles bottler. The Los Angeles bottler refused to stop delivering to the warehouses. When Royal Crown was apprised of the situation, it took no action.

2. First Beverages' Sales

In July 1970, H & M, a Los Angeles food broker, inquired whether or not First Beverages would be interested in selling large quantities of soft drinks for delivery to Alpha Beta, a large supermarket chain, at its Southern California central warehouse. First Beverages agreed to sell the soft drinks to Mae-Con, a Las Vegas food distributor. Mae-Con took title to the soft drinks in Las Vegas, arranged for their shipment and resale in Los Angeles and paid H & M's brokerage fees. The truckers used by Mae-Con were not licensed to carry goods for hire in interstate commerce by the ICC and charged substantially less than the ICC-authorized rates for delivery. Royal Crown characterizes this agreement as a conspiracy to undermine its distribution system and argues that Mae-Con's taking title was a sham designed to mislead Royal Crown into believing that First Beverages was selling within its territory when in fact it was selling directly to Alpha Beta in Southern California.

The Los Angeles bottler discovered that soft drinks produced in Las Vegas were coming into its territory and complained to Royal Crown. Royal Crown investigated the complaint and decided to take action against First Beverages and its principal owner.[2/] It issued two letters: one to First Beverages indicating that it was

limiting the amount of concentrate it would sell to First Beverages in the future to an amount based on its average past monthly sales (before sales to Mae-Con began), and one to Norton Packaging indicating that Norton Packaging's canning contract would be terminated in 60 days. Royal Crown enforced neither of these letters--a few weeks after the letters went out First Beverages sold its Royal Crown franchise to a company which agreed to terminate the Alpha Beta sales, and, apparently because of this turn of events, Norton Packaging was continued as a contract canner until it went out of business several years later.

C. Proceedings Below

First Beverages and Norton Packaging filed suit against Royal Crown in October of 1974. About one month later, H & M and Mae-Con filed a similar suit. All of these appellants alleged that Royal Crown's franchise system and other actions violated the antitrust laws.

Royal Crown responded that its franchise system was lawful and asserted counterclaims against the plaintiffs and Will Norton. Royal Crown urged that appellants had violated the antitrust laws by breaching and conspiring to breach First Beverages' bottling agreement. Breach of contract and related counterclaims were also stated.

Trial began in August, 1976, and ended in October of the same year. Near the end of the trial, the district court concluded that Royal Crown's territorial restraints had to be judged under the rule of reason. The court therefore refused appellants' proferred per se instruction

and gave a rule of reason instruction.[3]

The jury found for Royal Crown both on appellants' claims and on Royal Crown's counterclaims. Royal Crown was awarded $500 on each of its six counterclaims that went to a verdict; the amount was trebled for the five antitrust claims. The jury's verdict was filed on October 8, 1976, and judgment was entered a week later.[4]

II. Appellants' Antitrust Claims

Appellants contend that an intervening change of law requires that their antitrust claims be retried. They also argue that the district court committed several other errors during the trial.

A. Refusal to Give a Per Se Instruction

Appellants proposed that the jury be given an instruction that a vertical territorial restraint is per se unreasonable and violative of Sherman Act §1.[5] The district court refused to give such an instruction and instead gave a "rule of reason" instruction.

Appellants argue that the district court erred, under the law as it stood at the time of trial, in refusing their proffered per se instruction, citing United States v. Arnold, Schwinn & Co., 388 U. S. 365 (1967), and Continental T.V., Inc. v. GTE Sylvania Inc., 433 U. S. 36, 45-46 (1977). However, they recognize that the district court's refusal to give a per se instruction based on Schwinn was vindicated by the Supreme Court's GTE Sylvania opinion. 433 U. S. at 47-59.[6]

Nonetheless, they contend that they are entitled to a new trial. They maintain that while GTE Sylvania overruled the Schwinn per se rule, it did not preclude per se treatment of all vertical territorial restrictions, but merely changed the "burden of proof" regarding the propriety of a per se instruction. They argue that they should be given an opportunity to meet this new burden of proof.

In GTE Sylvania, the Supreme Court overruled its ten-year-old holding in Schwinn that all vertically imposed restrictions on the resale of goods sold to a distributor were per se violative of §1. The Court said:

> We revert to the standard articulated in Northern Pac. R. Co. [v. United States, 356 U. S. 1 (1958)], and reiterated in White Motor Co. [v. United States, 372 U. S. 253 (1963)], for determining whether vertical restrictions must be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 356 U. S., at 5. Such restrictions, in varying forms, are widely used in our free market economy. As indicated above, there is substantial scholarly and judicial authority supporting their economic utility. There is relatively little authority to the contrary. Certainly, there has been no showing in this case, either generally or with respect to Sylvania's

> agreements, that vertical restrictions have or are likely to have a "pernicious effect on competition" or that they "lack . . . any redeeming virtue." Ibid. Accordingly, we conclude that the per se rule stated in Schwinn must be overruled. In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition under Northern Pac. R. Co. But we do make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than--as in Schwinn--upon formalistic line drawing.
>
> In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to Schwinn. When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under §1 of the [Sherman] Act.

433 U. S. at 57-59 (footnotes omitted).

One of the restrictions involved in the Schwinn case was a vertical territorial restriction legally indistinguishable from the restriction of which the appellants in this case complain.[7] The Court, in

declaring the restrictions involved in Schwinn to be legally indistinguishable from those it faced in GTE Sylvania, 433 U. S. at 46, and in holding that the GTE Sylvania restrictions could not be subjected to per se analysis, impliedly held that vertical territorial restrictions such as those involved in the case before us must be analyzed under the rule of reason. While the Supreme Court may have left open the possibility that some vertical restrictions may be analyzed under the per se rule when a showing of pernicious economic effect or lack of any redeeming virtue is made, it has clearly indicated that the economic effects of vertical non-price restrictions such as the one challenged here are now too uncertain to justify departure from the traditional rule of reason. Therefore, there is no need to remand this case so that appellants have an opportunity to meet the "new burden of proof" regarding per se analysis. The Supreme Court has decided that the restraint involved in this case must be analyzed under the rule of reason as it was below. See Reno-West Coast Distribution Co. v. Mead Corp., No. 77-1029, slip op. at 554, 557, ____ F.2d ____, ____, 1979-1 Trade Cas. ¶62,544 (9th Cir. Feb. 21, 1979), cert. denied, 48 U. S. L. W. 3291 (U. S. Oct. 29, 1979).

B. The Rule of Reason Instruction

Appellants next contend that they are entitled to a new trial because GTE Sylvania "cast additional light on the proper application of the rule of reason in vertical territorial restraint cases." They claim that this "elaboration" makes the rule of reason instruction given in this case "misleading".

Specifically, appellants contend that GTE Sylvania emphasizes consideration of intrabrand and interbrand competition. They also argue that the Supreme Court made clear, for the first time, that methods of product promotion that could be used in the absence of territorial restrictions should be considered by the jury. Their claim is based upon the Court's discussion of the relationship of intrabrand and interbrand competition, 433 U. S. at 51-57, and its discussion of promotional activities, id. at 56 n.25.

The thrust of the Supreme Court's discussion of interbrand and intrabrand competition in GTE Sylvania is that not enough is known about the overall effects of vertical territorial restrictions on all competition--both interbrand and intrabrand--to justify application of a per se rule. Id. at 51-52, 57-58.[8/] Similarly, its discussion in footnote 25 of promotional activities is a direct response to a commentator's assertion that the promotional activities encouraged by vertical restrictions result in decreased interbrand competition and is directed to the same end as the interbrand-intrabrand discussion: showing that not enough is yet known about the effects of vertical territorial restrictions to justify departure from the rule of reason.

The Supreme Court was not concerned in GTE Sylvania with refining the rule of reason. Instead, its concern was with the Schwinn per se rule and the lack of justification for Schwinn's departure from the rule of reason. This is made clear by the context of the Court's discussions of interbrand and intrabrand competition and of promotional activities. See 433 U. S. at

51-58. Further support for this reading of GTE Sylvania can be found in the Court's quotation of the traditional rule of reason formulation, with apparent approval. Id. at 49 n.15, quoting Chicago Board of Trade v. United States, 246 U. S. 231, 238 (1918).9/ See also Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883, 885 (1st Cir.) (quoting with approval the Chicago Board of Trade formulation of the rule of reason after the GTE Sylvania decision), cert. denied, 439 U. S. 833 (1978); Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 82 n.20 (3d Cir. 1977) (GTE Sylvania did not "affect the analysis under the rule of reason test"), cert. denied, 436 U. S. 913 (1978).

The district court gave a traditional rule of reason instruction closely paralleling the statement of the rule of reason found in Chicago Board of Trade. Compare note 3 supra with note 9 supra. Appellants conceded that this instruction was a correct statement of the rule of reason as it existed at the time of trial. Since GTE Sylvania did not affect rule of reason analysis, the instruction given is just as sufficient after GTE Sylvania as it was before the Supreme Court issued its opinion in that case. If anything, the Court's approval of the Chicago Board of Trade statement of the rule of reason in GTE Sylvania "ratifies" the district court's instruction.

C. Evidence of Similar Restrictions Imposed by Competitors

Royal Crown adduced evidence at trial that Coca-Cola Co. and PepsiCo--two of Royal Crown's competitors--used vertical territorial restrictions in marketing their products similar to those utilized by Royal Crown. In closing, Royal Crown argued that

it would be unfair in effect to deny it the use of such a restriction by holding it liable for imposing the restriction when Coca-Cola Co. and PepsiCo, the industry giants, used a similar distribution system.

After trial, the FTC held that the Coca-Cola and PepsiCo restrictions violated §5 of the Federal Trade Commission Act. In the Matter of the Coca-Cola Co., No. 8855 (F.T.C. April 25, 1978), Trade Reg. Rep. (CCH) Supp. No. 330; In the Matter of PepsiCo, Inc., No. 8856, id. These decisions have been appealed to the Court of Appeals for the District of Columbia Circuit. Coca-Cola Co. v. FTC, No. 78-1364 (heard October 25, 1978).

Appellants argue that the FTC decisions make a remand necessary. They contend that the evidence adduced by Royal Crown and its closing argument implied that Coca-Cola's and PepsiCo's restrictions were lawful. They concede that this implication was not incorrect as of the time of trial, as no tribunal had yet held those territorial restrictions violative of the antitrust laws. However, they maintain, the FTC decisions changed the law and make the implication of lawfulness incorrect today.

The FTC decisions in Coca-Cola and PepsiCo did not work an intervening change in the law. In those cases, the FTC merely applied the existing law under GTE Sylvania: that vertical territorial restrictions must be analyzed under the rule of reason.10/

At most, the FTC decisions affect the factual circumstances surrounding the case. That a tribunal has subsequently

held illegal the Coca-Cola and PepsiCo restrictions relied upon by Royal Crown to justify its adoption of similar restrictions is a new fact not in existence at the time of trial. The proper approach to seeking relief from judgment because of a change in the factual circumstances surrounding this case would be to make a Rule 60(b) motion or a motion to reopen to hear additional proof. Such motions must be directed in the first instance to the district court. The trial court, having heard all of the evidence in a case, is in a much better position than is this court to decide whether or not the new evidence justifies relief from judgment. See Thomas v. SS Santa Mercedes, 572 F.2d 1331, 1336 (9th Cir. 1978); Martella v. Marine Cooks & Stewards Union, 448 F.2d 729, 730 (9th Cir. 1971), cert. denied, 405 U. S. 974 (1972); 11 C. Wright & A. Miller, Federal Practice and Procedure §2865, at 224-25 (1973). This court's role, with regard to a Rule 60(b) motion or a motion to reopen, is limited to reviewing the decision of the district court to determine if there was an abuse of discretion. Browder v. Director, 434 U. S. 257, 263 n.7 (1978).11/

We therefore decline to remand this case because of the FTC decisions in Coca-Cola and PepsiCo.

D. Acquiescence and Participation: The Pari Delicto Defense

In Perma Life Mufflers, Inc. v. International Parts Corp., 392 U. S. 134 (1968), the Supreme Court declared that "the doctrine of in pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." Id. at 140, quoted in

Memorex Corp. v. IBM, 555 F.2d 1379, 1381 (9th Cir. 1977). The doctrine of in pari delicto is that a plaintiff who has participated in wrongdoing cannot recover when he suffers injury as a result of the wrongdoing. Memorex Corp. v. IBM, 555 F.2d at 1381.

Before trial, Royal Crown argued to the court that Perma Life did not bar a defense based upon appellants' "truly complete involvement and participation in a monopolistic scheme," Perma Life Mufflers, Inc. v. International Parts Corp., 392 U. S. at 140, and asserted such a defense in its papers. Appellants moved for a partial summary judgment on this defense, or in the alternative for an order in limine excluding evidence of the pari delicto defense from trial. While the district court never ruled on appellants' motion in the alternative, it did refuse to instruct the jury on anything resembling a pari delicto defense.

Appellants contend that this refusal to instruct does not cure the error they claim the district court made when it did not grant their motion in the alternative. They argue that certain evidence was admitted tending to establish the pari delicto defense and that Royal Crown's closing argument emphasized that evidence to the jury.

Having carefully reviewed the record, and paying particular attention to the testimony and argument that appellants contend tends to establish and emphasize the pari delicto defense, we conclude that if the district court erred in failing to grant appellants' motion in the alternative, that error was harmless. The evidence adduced

by Royal Crown did not tend to show that appellants had conducted themselves illegally or inequitably, nor did Royal Crown argue that appellants should recover nothing because of their illegal or inequitable conduct. The legality and equity of appellants' conduct were never raised. Instead, the evidence adduced tended to show that appellants were familiar with territorial restrictions such as those at issue in this case, felt that they could make a profit with these restrictions or that the restrictions were necessary to their running a profitable enterprise, and that the restrictions in no way prevented them from doing anything they wanted to do. Royal Crown's closing argument emphasized this evidence only as tending to show the reasonableness of the restrictions and that appellants suffered no injury as a result of the restrictions.

Perma Life and Memorex teach that private wrongdoing should not be a bar to an action for the public wrong of violating the antitrust laws. 392 U. S. at 138-39; 555 F.2d at 1382. They do not foreclose the introduction of evidence for purposes other than to show an antitrust plaintiff's improper conduct. They neither bar evidence of plaintiff's acceptance and advocacy of the restrictions challenged as relevant to the question of the reasonableness of the restrictions, nor ban evidence that the plaintiff claimed not to have violated the restrictions and never intended to violate them on the question of injury due to imposition of the restrictions.

Here, the jury was never presented with evidence or argument that appellants' acquiesence and participation in, and advocacy of, the territorial

restrictions contained in the Royal Crown franchise agreement were somehow improper and therefore precluded recovery on the antitrust claim. Moreover, the court properly refused to give an in pari delicto instruction. Under such circumstances, we reject appellants' contention that an improper pari delicto defense was presented.

E. Evidence of Illegal Trucking Arrangements: The Quasi Unclean Hands Defense

Appellants' final contention with regard to their antitrust claims against Royal Crown is that the district court erred in allowing Royal Crown to present evidence concerning the illegality of the arrangement under which appellants' product was shipped to Los Angeles. Appellants argue that Royal Crown was thereby allowed to present an "unclean hands" defense barred by Memorex.

Prior to trial, Royal Crown argued:

> It is defendants' position that plaintiffs' illegal backhaul activity is relevant to (1) the fact of damage, (2) the amount of damage, if any, (3) whether the scheme would have been promptly halted by the ICC, and (4) whether there is a legally cognizable cause of action.

Over appellants' objection, the district court ruled that while it did not believe that appellants' illegal trucking arrangements barred their antitrust claims completely, evidence of unlawful shipment was admissible on questions of damages and

related matters.[12]/

At trial, Royal Crown presented testimony concerning the arrangement whereby First Beverages' product was shipped to Los Angeles area central warehouses, to show that: (1) the amount paid for each shipment from Las Vegas to Los Angeles was between $100 and $150; (2) at the relevant time, the ICC common carrier minimum rate for such a shipment was $492; (3) the truckers carrying the goods into Los Angeles for appellants did not have the proper ICC authorization to do so; (4) the common carriers licensed to haul goods along that route would have soon complained to the ICC of the "gypsy" or unlicensed trucking operation; and (5) the ICC would have taken action to stop the illegal arrangement soon after it had been informed of its existence.

At the close of trial, appellants emphasized to the jury in their closing argument that the court would instruct the jury that the illegal trucking evidence could be "considered by you for one reason only": to "determin[e] the amount of profits plaintiffs would have made" in the absence of the territorial restrictions. Royal Crown similarly argued that the illegal shipping arrangments should be considered, because "[t]he authorities will put a stop to it. And, therefore, you can't fairly make projections of profit, loss, sales, whatever, . . . when you should be paying . . . substantially more" for transportation.

Along the same line, the court instructed the jury as follows:

In addition to its defenses,

Royal Crown Cola contends that plaintiffs' damages, if there were any, must be diminished because the shipping arrangement employed by the plaintiffs contravened federal law permitting profits that would not otherwise have been available.

. . . .

Plaintiffs claim as their damages profits which they would have made, had their shipping and sales arrangements of the late 1970's [sic--the court meant late 1970] continued for several years. In determining the amount of these lost profits, if any, you are entitled to consider defendant's evidence that the shipping arrangements which were used for the actual sales and deliveries to Alpha Beta may have been contrary to federal statutes and the rules and regulations of the Interstate Commerce Commission. You are entitled to consider and to determine the possibility that, at some time after October, 1970, the Interstate Commerce Commission might have obtained an order stopping those truckers from continuing to transport Royal Crown products to the Southern California area from Las Vegas. Thus, you are entitled to consider the possibility of increased shipping costs and decreased profits.

After careful review of the record,

we find that the jury was never informed by the district court's instructions, by Royal Crown's closing argument, or by Royal Crown's manner of presenting the evidence, that the illegality of the trucking arrangement might constitute a complete affirmative defense.

Thus this case could not violate the principle of those cases holding that a plaintiff's illegal conduct cannot be raised as a complete bar to his antitrust action. See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U. S. at 138-41 (in pari delicto: plaintiff's participation in complained-of franchising scheme); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211, 214 (1951) (unclean hands: plaintiff's participation in price-fixing scheme unrelated to complained-of maximum resale price restriction and concerted refusal to deal); Memorex Corp. v. IBM, 555 F.2d at 1380-82 (illegal market presence: plaintiff's theft of trade secrets from defendant was the source of the sales plaintiff allegedly lost); Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 688-89 (9th Cir.) (same: sales based on illegal commercial bribery), cert. denied, 429 U. S. 940 (1976).

The reason why illegal conduct by an antitrust plaintiff cannot completely and automatically bar his claim is that

> the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the

> antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U. S. at 139; see Memorex Corp. v. IBM, 555 F.2d at 1382.

Appellants claim that this doctrine has been extended by this court's dictum in Memorex v. IBM Corp., id., at 1384 n.8, so that Royal Crown could not properly use evidence of the illegal trucking arrangement even to argue for reduced damages. We disagree. Memorex held that Memorex's antitrust action against IBM would not be barred even if Memorex's lost sales were founded on Memorex's theft of trade secrets from IBM. We added that IBM could use evidence of the theft for impeachment purposes or to prove that a prior action based on the theft was filed in good faith, but not to reduce damages. Id. The point of this footnote is that where the illegal act by the plaintiff is directed against the defendant, the defendant should not use this fact to reduce his liability for his own breach of public policy, but should bring a counterclaim based on the plaintiff's breach of public policy. See id. at 1382-83; Calnetics Corp. v. Volkswagen of America, Inc., 531 F.2d at 689 (counterclaim asserted). Then both public wrongs may be formally vindicated, instead of only one or neither. The defendant's illegal conduct does not bar the counterclaim, of course, for the same reason that the

plaintiff's illegal conduct does not bar the claim.

Unlike the Calnetics and Memorex defendants, Royal Crown introduced evidence of illegality not to prevent the appellants from presenting any case at all, but to show that some or all of the alleged lost profits would never have materialized. The illegality was not attacked on an abstract level; instead, Royal Crown tried to show that in fact the ICC would have intervened.

Moreover, the Memorex footnote is inapplicable where, as here, the plaintiff's illegal conduct was not directed at the defendant. See 555 F.2d at 1382 n.5. Royal Crown has no claim or counterclaim based on the trucking arrangement. Since the policy reasons underlying the Memorex dictum are absent here, it was proper for Royal Crown to introduce its evidence to disprove part or all of the claimed damages. Any other rule would allow plaintiffs to recover, trebled, more than actually compensatory damages.

III. Royal Crown's Counterclaims

Royal Crown asserted antitrust and breach of contract counterclaims against appellants. The jury returned general verdicts in the amount of $500 against each appellant on the antitrust counterclaims. The court trebled these awards pursuant to §4 of the Clayton Act, 15 U. S. C. §15. The jury also returned a verdict against First Beverages on Royal Crown's breach of contract counterclaim in the amount of $500. Finally, the court awarded Royal Crown costs and $10,000 in attorney's fees.

Appellants argue that the district court erred with reference to the counterclaim. They make two claims.

Appellants first contend that Royal Crown asked for and received only nominal damages, not actual damages, on each of its counterclaims.[13/] Royal Crown disputes this characterization of its prayer, arguing that it presented substantial evidence concerning its actual damages of between $18,000 and $20,000 due to appellants' actions. It maintains that it merely "voluntarily scaled down the amount of actual damages claimed to $500 per party on each counterclaim."

It is a fundamental principle of antitrust law that a plaintiff must show that it has suffered some actual "antitrust injury" in order to prevail in a treble damage action. Clayton Act §4; see Kapp v. National Football League, 586 F.2d 644, 648-49 (9th Cir. 1978), cert. denied, ____U. S. ____, 99 S.Ct. 1996 (1979); John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498-99 (9th Cir. 1977). The district court properly instructed the jury on this point. It charged:

> [I]f you find that a conspiracy existed and that it was unlawful, then you must determine whether the conspiracy proximately caused injury to Royal Crown Cola Company, and, if so, the amount of damages.

The court also adopted by reference the following statement from its earlier instructions on appellants' antitrust claims:

> A party is entitled to sue and recover damages under the antitrust laws only if it in fact has suffered a legal injury . . . . A party, to recover, must not only demonstrate by a preponderance of the evidence a violation of the antitrust laws, but also that those violations actually caused injury to the party's business or property.

Because the jury was properly instructed that it could not return a verdict in Royal Crown's favor without finding that appellants' alleged violations of the antitrust laws proximately caused Royal Crown some actual injury, there is no reversible error in Royal Crown's and the court's use of the term "nominal damages". The term was used merely as a shorthand expression denoting that Royal Crown had limited its request for damages due to actual injury to a nominal amount; it was not used in the technical legal sense to mean damages awardable without proof of actual injury. The jury is presumed to have followed its instructions, Husky Refining Co. v. Barnes, 119 F.2d 715, 717 (9th Cir. 1941), and under the instructions in this case, the jury had to find that Royal Crown was actually injured by appellants' antitrust violations before it returned a verdict in any amount for Royal Crown.

Appellants also contend that Royal Crown's counterclaims must be remanded for a new trial because their antitrust claims must be retried. Because we have rejected each of appellants' assignments of error in regard to their antitrust claims, see Part II supra, we must also reject this contention.

AFFIRMED.

FOOTNOTES

1. The United States Court of Appeals for the District of Columbia Circuit currently is considering an appeal from the FTC's decisions in thses cases. Coca Cola Co. v. FTC, No. 78-1364 (heard Oct. 25, 1978).

2. Norton Packaging owned more than 75% of First Beverages' outstanding stock. Norton Packaging was owned and managed by Will Norton.

3. The trial court gave the following rule of reason instruction:

> In determining whether or not a particular restraint is reasonable or unreasonable and therefore that it is or is not a violation of the antitrust laws, you may consider:
> First: The nature of the particular industry involved;
> Second: Facts which are peculiar to the business in which the restraint is applied;
> Third: The nature of the restraint and its effect, actual and probable, upon soft drink bottlers and upon consumers;
> Fourth: The history of the restraint; and
> Fifth: The reasons for adopting the practice.

4. The judgment was amended several times in January and July of 1977. The amendments made provision for the award of costs and attorney's fees to Royal Crown.

5. Appellants requested that the following per se instruction be given:

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuses for their use. Such agreements or practices are termed per se unreasonable, and are not to be tolerated even if they are well intended or because they are allegedly developed to increase competition.

A vertical territorial restraint is a restraint imposed by a manufacturer as a condition of doing business with a dealer or distributor. A vertical territorial restraint is a per se violation of §1 of the Sherman Antitrust Act where a manufacturer of a product, which manufacturer is neither a new entrant in the business nor a failing company, sells its product to its dealer or distributor and thereafter, by agreement with the dealer, prohibits the dealer from selling to persons located outside of a specifically designated territory. The rule that a vertical territorial restraint is per se unreasonable does not apply in the situation where the manufacturer delivers his products to a dealer whose position and function are, in fact, indistinguishable from those of

an agent or salesman of the manufacturer and the manufacturer completely retains all indicia of ownership including title, dominion, and risk.

The instruction concludes with a direction that the jury find that the Royal Crown franchise agreement per se violated §1.

6. One explanation for the district court's refusal to give a per se instruction may be found in our decision in GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980 (9th Cir. 1976). There, we distinguished Schwinn on several grounds: the nature of the restrictions involved, their effect upon competition and the market shares of the parties imposing the restrictions. See Continental T.V., Inc. v. GTE Sylvania Inc., 433 U. S. at 41.

At the time of the trial in this case, the rationale of our GTE Sylvania decision had not yet been rejected by the Supreme Court. The district court therefore ordered the parties to submit memoranda likening the case before it to either Schwinn or our GTE Sylvania. Based upon these memoranda and the record before it, the court adopted the rule of reason as the appropriate yardstick by which to measure Royal Crown's conduct.

The Supreme Court reviewed our GTE Sylvania decision after judgment had been entered in this case. While rejecting our distinction, it affirmed our judgment that the GTE Sylvania restrictions could not be analyzed under the per se rule. As we point out in this opinion, the Supreme Court also effectively ratified the district court's decision to apply the

rule of reason in this case.

7. That restriction was described in GTE Sylvania as follows: "Each distributor had a defined geographic area in which it had the exclusive right to supply franchised retailers." 433 U. S. at 42. This restriction is one of many involved in Schwinn. See 433 U. S. at 42-43; United States v. Arnold, Schwinn & Co., 388 U. S. at 370-71.

8. The Supreme Court and this court indicated before the trial in this case that both interbrand and intrabrand competition must be considered under the antitrust laws. See, e.g., White Motor Co. v. United States, 372 U. S. at 268-70 (Brennan, J., concuring); United States v. Arnold, Schwinn & Co., 388 U. S. at 369-70, 379-82; GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d at 1000-01.

Appellants also apparently recognized that both interbrand and intrabrand competition and their relationship should be considered. During their opening statement, H & M and Mae-Con indicated that they would present evidence that the restriction involved had anticompetitive effects on both interbrand and intrabrand competition. Royal Crown also addressed this issue in its opening statement. Moreover, evidence concerning the effects of the restriction here challenged on both interbrand and intrabrand competition was presented at trial.

Therefore, we reject appellants' contention that they were not aware of the importance of both interbrand and intrabrand competition prior to the Supreme Court's discussion of them in GTE Sylvania.

9. The Chicago Board of Trade formulation cited by the Supreme Court reads as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

246 U. S. at 238.

10. Of course, even if the FTC had adopted a new rule of law or changed existing law, we would not be bound by the new FTC rule.

11. We express no opinion on the merits of such a motion.

12. Appellants argue that the jury might

have considered the evidence on the question of the reasonableness of the franchise restraint. In this argument, they rely heavily on Royal Crown's pretrial statement that such evidence would be relevant on the question of reasonableness as well as on damages issues.

We reject this position. Royal Crown's pretrial argument was intended to convince the court that the "gypsy" trucking evidence should be admitted for more than just the issue of damages. The court rejected Royal Crown's argument and expressly limited such evidence to that issue. Therefore, appellants' reliance on Royal Crown's pretrial and pre-ruling statements is misplaced.

The district court clearly limited the jury's consideration of the illegal shipping arrangement to the issue of damages, and used an instruction proposed by appellants in doing so.

13. In support of this contention, appellants rely on two statements to the jury. The first was made by counsel for Royal Crown in closing argument:

> We are only asking for nominal damages just to emphasize the point, and his Honor will advise you, we have limited our request to $500 per party, and his Honor will instruct you that is the maximum that can be awarded.

The other statement appellants rely on is one of the court's instructions to the jury.

> Here, however, Royal Crown Cola

Company seeks only nominal damages or $500 from the plaintiffs. Even if you find that Royal Crown Cola Company's damages are more than $500, you may not award a greater amount.

APPENDIX B

The following provisions of the Sherman Act[1] are involved:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under

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[1]Act of July 2, 1980, c. 647, 26 Stat. 209; 15 U.S.C.A. §§1-7.

> section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," approved September 26, 1914: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the esablishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $50,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> . . .
>
> Sec. 8. That the word "person" or "persons", whenever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States,

the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

The following provisions of the Clayton Act[2] are also involved:

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy seven, inclusive of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen

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[2]Act of October 15, 1914, c.322, 38 Stat. 730; 15 U.S.C.A. §§12-27.

hundred and thirteen; and also this Act.

. . .

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

. . .

Sec. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an

injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

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No. 79-1683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

FIRST BEVERAGES, INC. OF LAS VEGAS, ET AL., *Petitioners*

v.

ROYAL CROWN COLA CO.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR ROYAL CROWN COLA CO. IN OPPOSITION

JAMES H. WALLACE, JR.
JOHN B. WYSS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5140

Attorneys for Respondent

KIRKLAND & ELLIS
Washington, D.C.

W. NOLAN MURRAH, JR.
General Counsel
Royal Crown Companies, Inc.
Atlanta, Georgia 30346

Of Counsel

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BRIEF FOR ROYAL CROWN COLA CO. IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-31) is reported at 612 F.2d 1164. The district court's judgment was entered upon general verdicts of the jury.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1980. The petition for writ of certiorari was filed on April 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), and in light of the jury's finding of reasonableness after seven weeks of trial, the court of appeals correctly affirmed the trial court's application of and jury instructions concerning the traditional rule of reason standard for assessing the antitrust legality of vertical territorial restrictions?

2. Whether the court of appeals correctly determined that, as a factual matter and based upon a careful review of the entire record, no improper *pari delicto* or "unclean hands" affirmative defense had been permitted at trial?

3. Whether the court of appeals correctly affirmed the jury's award of compensatory counterclaim damages under instructions which required a finding of actual injury as a prerequisite to any recovery?

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15, are set forth at Pet. App. B 32-33, 35.

STATEMENT

Royal Crown Cola Co. (Royal Crown)[1] is a manufacturer of concentrates used for producing trademarked soft drinks. It sells concentrates to its trademark licensees or "bottlers" who use these concentrates as the key ingredient in manufacturing finished

[1] Now Royal Crown Companies, Inc. Reference here will be to the company as it was named at the time of trial.

soft drinks according to strict standards imposed by Royal Crown. Royal Crown's licensing agreements give the bottlers the right to purchase soft drink concentrates, to manufacture bottled soft drinks and to sell finished soft drink products under Royal Crown's trademarked names in an exclusive geographic territory. All major soft drink companies in the United States use similar exclusive territorial distribution systems. (Pet. App. A 2-3.)

Petitioner First Beverages, Inc. of Las Vegas (First Beverages) was, during portions of 1969 and 1970, the licensed bottler of Royal Crown products in the Las Vegas, Nevada area.[2] In July of 1970, First Beverages and other petitioners secretly made arrangements to sell large quantities of soft drinks to a Southern California supermarket chain located in the exclusive territory of Royal Crown's Los Angeles bottler. Petitioners sought to disguise these transactions by use of various intermediaries and shipped the products into Los Angeles by unlicensed "gypsy" truckers operating without Interstate Commerce Commission (ICC) authorization.[3] Within a few months, after some correspondence between Royal Crown and First Beverages, the Los Angeles shipments ceased when First Beverages disposed of its bottling operations to another company. (Pet. App. A 3, 5-6.)

[2] First Beverages was established and controlled by petitioner Wilmer R. Norton as a corporate subsidiary of Norton's Phoenix contract canning operation, petitioner Norton Packaging, Inc. of Arizona.

[3] H&M, a Los Angeles food broker, originally set up the sales and employed petitioner Mae-Con Enterprises, Inc., a Las Vegas food distributor, to arrange the "gypsy" trucking operation (Pet. App. A 5).

Approximately four years later, First Beverages and other petitioners filed suit against Royal Crown alleging that Royal Crown's exclusive territorial licensing and other actions violated the antitrust laws. Royal Crown responded that its trademark licensing agreements were lawful and asserted counterclaims against all petitioners. These counterclaims charged breach of contract by First Beverages, as well as an antitrust conspiracy among all petitioners to undermine and disrupt Royal Crown's distribution system. (Pet. App. A 6.)

Prior to trial, petitioners filed numerous motions for a ruling that Royal Crown's licensing agreements were a *per se* violation of the antitrust laws. The district court denied these motions and a full "rule of reason" trial was held concerning the economic effects and competitive impact of Royal Crown's vertical territorial distribution system (Pet. 10-11). This trial, which lasted seven weeks before Hon. Malcolm Lucas and a jury, developed a comprehensive factual examination of the "reasonableness" issue in almost 5,500 pages of trial transcript and some two hundred separate exhibits.

In the final days of trial, and based on the full factual record then available, Judge Lucas reconfirmed his numerous pretrial rulings and again concluded that Royal Crown's territorial restrictions should be judged under the rule of reason, rather than a *per se* standard. Accordingly, he gave a traditional jury instruction which closely paralleled the statement of the rule of reason articulated in *Chicago Board of Trade*[4] and

[4] *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918).

which petitioners conceded was a correct statement of the law. The jury thereupon found for Royal Crown both on petitioners' claims and on Royal Crown's counterclaims. Judgment was entered upon the jury's verdicts and Royal Crown was awarded a total of $8,000 in damages plus costs and a reasonable attorney's fee. (Pet. App. A 6-7, 12.)

On appeal, the Ninth Circuit issued a detailed thirty-page opinion analyzing and rejecting all of petitioners' present contentions. Specifically, the court of appeals held that: (1) consistent with this Court's decision in *GTE Sylvania*,[5] Judge Lucas properly applied and correctly instructed the jury concerning the traditional "rule of reason" standard for vertical territorial restraints (Pet. App. A 7-12); (2) based on a "careful review of the record," no improper *pari delicto* or "unclean hands" defense had been permitted at trial (Pet. App. A 14-22); and (3) Royal Crown was properly awarded compensatory damages on its counterclaims for injury actually sustained (Pet. App. A 22-24).

ARGUMENT

The petition presents no question warranting review by this Court. Petitioners were afforded every opportunity to develop and present their case during the comprehensive, seven-week "rule of reason" trial below. They failed, however, to persuade either Judge Lucas or the jury that Royal Crown's territorial trademark licensing system was in any way unreasonable, let alone "manifestly anti-competitive" so as to justify *per se* prohibition.

[5] *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

In these circumstances, the court of appeals correctly affirmed that the trial court's application of the traditional rule of reason standard and related jury instructions were completely consistent with this Court's holding in *GTE Sylvania*. Similarly, based on a "careful review" of the extensive trial record, the court of appeals further ruled that petitioners' claims concerning *pari delicto*, unclean hands and nominal damages were without factual support. This litigation was thus decided correctly on the basis of its own particular facts. The decisions below raise no conflict between circuits, nor do they present any issue of importance or precedent under federal law which this Court ought to review.

I. The Court Below Correctly Applied A Traditional Rule Of Reason Analysis To The Vertical Territorial Restrictions At Issue.

The important question of appropriate antitrust analysis for vertical restrictions was fully addressed by this Court just three years ago in *GTE Sylvania*. There, the Court ruled that such restrictions are to be governed by the traditional rule of reason standard, rather than a *per se* approach (433 U.S. at 57-59). Although not foreclosing the possibility that particular applications of vertical restrictions might justify *per se* prohibition, the Court made clear that departure from the rule of reason standard must be based upon "demonstrable economic effect" meeting the "demanding standards" of *Northern Pacific Railway Co.*[6] (*id.* at 49-50, 58-59). The Court specifically applied this analysis to the territorial-type restrictions at issue

[6] *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958).

both in *GTE Sylvania* and in the earlier *Schwinn* case[7] and found no "pernicious effect on competition" or "lack of any redeeming virtue" necessary to justify a *per se* rule. To the contrary, the court expressly recognized that vertical territorial restrictions often promote interbrand competition and achieve economic efficiencies in the distribution process. (*Id.* at 54-58.)

Consistent with this Court's ruling in *GTE Sylvania*, the trial court denied multiple pretrial motions for a ruling that Royal Crown's territorial trademark licensing agreements were *per se* illegal; instead, it ordered a comprehensive rule of reason inquiry to explore fully the economic effects and overall competitive impact of the Royal Crown distribution system.[8] At the close of the seven-week trial, with the entire evidentiary record available, the district court reconfirmed its earlier determination that there was no factual predicate for a *per se* rule and, accordingly, instructed the jury on the traditional rule of reason

[7] *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

[8] Although trial was held in August, September and October, 1976 prior to issuance of this Court's *GTE Sylvania* opinion, the en banc opinion of the Ninth Circuit in that case, which this Court later affirmed, was available to and controlling on the district court. In addition, Judge Lucas was also guided by the *Northern Pac. R. Co.* standards for application of *per se* rules, as well as by a substantial body of precedent holding that the territorial trademark licensing system employed by Royal Crown and the rest of the soft drink industry should be judged under a traditional rule of reason, rather than a *per se*, analysis. *E.g.*, *Booth Bottling Co.* v. *Beverages Int'l, Inc.*, 361 F.Supp. 340 (E.D. Pa. 1973); *Royal Crown Bottling Co.* v. *Royal Crown Cola Co.*, 358 F.Supp. 290 (D. Colo. 1972); *In re Royal Crown Cola Co.*, FTC Docket 8858, 3 Trade Reg. Rep. (CCH) ¶ 24,470, Order Denying Partial Summary Decision (June 14, 1973); *Tomac, Inc.* v. *Coca-Cola Co.*, 418 F.Supp. 359 (C.D. Cal. 1976).

standard. On appeal, the Ninth Circuit properly affirmed this ruling based upon this Court's *GTE Sylvania* analysis of economic considerations relating to vertical territorial restrictions (Pet. App. A 7-10).

Contrary to their present assertions (Pet. 16, 20), petitioners were afforded a full and complete opportunity to introduce evidence as to the competitive impact of the Royal Crown distribution system during the exhaustive rule of reason trial below. The jury, however, considering the extensive evidentiary record, determined that Royal Crown's licensing agreements and actions were entirely reasonable. Petitioner's failure to carry their burden of proof under the traditional rule of reason standard negates, *a fortiori,* the "pernicious" and "manifestly anti-competitive" effects necessary to justify a *per se* prohibition.[9]

General Beverage Sales Co. v. *East-Side Winery,* 568 F.2d 1147 (7th Cir. 1978), and *Lamp Liquors, Inc.* v. *Coors Co.,* 563 F.2d 425 (10th Cir. 1977), relied on by petitioners, are not in conflict. In each of those cases the trial court had mechanically applied the now discredited *Schwinn per se* rule and pretermitted all in-

[9] As Justice Stevens recently observed in *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 476 (1978) (separate opinion):

> [P]roperly understood, rule-of-reason analysis is not distinct from "*per se*" analysis. On the contrary, agreements that are illegal *per se* are merely a species within the broad category of agreements that unreasonably restrain trade; less proof is required to establish their illegality, but they nonetheless violate the basic rule of reason.

Because the restraint involved here was tested under the full rule of reason analysis and found by the jury to be perfectly legal and reasonable, it cannot be so "lack[ing] of any redeeming virtue" as to justify *per se* treatment.

quiry into the economic impact of the challenged restraints. In light of *GTE Sylvania,* the Seventh and Tenth Circuits properly reversed and remanded for a rule of reason trial, admonishing that "a *per se* prohibition would be justified only when the threshold of economic harm set forth in *Northern Pacific R. Co.* is reached" (*Lamp Liquors,* 563 F.2d at 432; *see General Beverage,* 568 F.2d at 1154). Here, by contrast, petitioners were given a full and fair opportunity to present relevant competitive effects evidence and simply failed to carry their burden of proof that Royal Crown's licensing agreements and actions were unreasonable.

In summary, the district court and the court of appeals rulings below are entirely consistent with this Court's analysis in *GTE Sylvania.* Petitioners were entitled to—and received—a full rule of reason trial on their antitrust challenge to the Royal Crown distribution system. Further review by this Court is therefore unwarranted.

II. The Trial Court's Rule of Reason Instruction, Affirmed By The Court Of Appeals, Was Without Legal Error.

The trial court's instruction to the jury recited essentially verbatim this Court's statement of the rule of reason in *Chicago Board of Trade* (Pet. App. A 12). Petitioners did not object to the charge at trial and, in fact, expressly "*conceded* that this instruction was a correct statement of the rule of reason" (*id.,* emphasis added).

This Court's decision in *GTE Sylvania* did not overrule the *Chicago Board of Trade* formulation, nor suggest that this traditional statement of the rule of

reason was legally inadequate, as petitioners now assert (Pet. 25-26). To the contrary, the *GTE Sylvania* opinion quotes at length, and with apparent approval, Mr. Justice Brandeis' seminal articulation of the rule of reason standard (433 U.S. at 49 n.15).[10] Subsequently, in *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 691 (1978), this Court further reconfirmed that "the Rule of Reason has remained faithful to its origins" and that "[f]rom Mr. Justice Brandeis' opinion for the court in *Chicago Board of Trade* to the Court opinion written by Mr. Justice Powell in [*GTE Sylvania*]," the Court has adhered to a consistent rule of reason analysis.

Numerous courts of appeals have also considered whether *Chicago Board of Trade* remains a correct statement of the rule of reason in light of the *GTE Sylvania* decision. In each case, the answer has been in the affirmative. *E.g., Eastern Scientific Co.* v. *Wild Heerbrugg Instruments, Inc.,* 572 F.2d 883, 885 (1st Cir.) (quoting with apparent approval the *Chicago Board of Trade* formulation after the *GTE Sylvania* decision), *cert. denied,* 439 U.S. 833 (1978); *Martin B. Glauser Dodge Co.* v. *Chrysler Corp.,* 570 F.2d 72, 82 & n.20 (3d Cir. 1977) (*GTE Sylvania* did not "affect the analysis under the rule of reason test"), *cert. denied,* 436 U.S. 913 (1978); *Hecht* v. *Pro-Football, Inc.,* 570 F.2d 982, 995-96 (D.C. Cir. 1977) (requiring full *Chicago Board of Trade* charge after *GTE Sylvania*), *cert. denied,* 436 U.S. 956 (1978).[11]

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[10] The Ninth Circuit's en banc decision in *GTE Sylvania* had also cited *Chicago Board of Trade* as the "classic form" of the rule of reason (537 F.2d 980, at 1001). That decision, later affirmed by this Court, was binding on the district court at trial.

[11] *Dougherty* v. *Continental Oil Co.,* 579 F.2d 954, 960 (5th Cir. 1978), cited by petitioners, is not to the contrary. In that case, the trial court had charged the jury on the elements of a *per se* violation under *Schwinn*. The court of appeals properly reversed, holding that, in light of *GTE Sylvania,* remand was necessary for a full rule of reason inquiry. Because a *Schwinn per se* charge had been given, rather than a rule of reason instruction, the court of appeals had no occasion to and did not address the legal adequacy of the classic *Chicago Board of Trade* formulation.

Similarly, petitioners' reliance (Pet. 27-28) on the Federal Trade Commission's decision in *Coca-Cola Co.,* 91 F.T.C. 517 (1978), is equally misplaced. There, the FTC did apply a rule of reason, rather than a *per se,* analysis (*id.* at 616) and actually quoted *Chicago Board of Trade* with approval (*id.* at 612 n.12). In all other respects, the FTC's decision is inapposite in that it was rendered under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; was based upon a factual record entirely different from the one below; and is now on appeal to the courts and therefore not yet final.

Petitioners further suggest that, because *GTE Sylvania* had not yet been decided, there was insufficient development and consideration of economic evidence concerning competitive effects at trial (Pet. 27-28, 32). As the court of appeals observed, however, such a suggestion is inconsistent with the evidentiary record:

> The Supreme Court and this court indicated before the trial in this case that both interbrand and intrabrand competition must be considered under the antitrust laws. *See, e.g., White Motor Co.* v. *United States,* 372 U.S. at 268-70 (Brennan, J., concurring), *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. at 369-70, 379-82; *GTE Sylvania, Inc.* v. *Continental T.V., Inc.,* 537 F.2d at 1000-01.
>
> [Petitioners] also apparently recognized that both interbrand and intrabrand competition and their relationship should be considered. During their opening statement, H & M and Mae-Con indicated that they would present evidence that the restriction involved had anticompetitive effects on both intrabrand and interbrand competition. Royal

> Crown also addressed this issue in its opening statement. Moreover, evidence concerning the effects of the restriction here challenged on both interbrand and intrabrand competition was presented at trial.
>
> Therefore, we reject [petitioners'] contention that they were not aware of the importance of both interbrand and intrabrand competition prior to the Supreme Court's discussion of them in *GTE Sylvania.* (Pet. App. A 28.)

In summary, the trial court's rule of reason instruction was drawn from *Chicago Board of Trade* and included language subsequently cited with approval by this Court both in *GTE Sylvania* and in *National Society of Professional Engineers.* The jury properly applied this traditional charge in finding, based on seven weeks of evidence and legal argument, that the overall competitive effect and impact of Royal Crown's distribution system was reasonable. Retroactive framing of new rule of reason jury instructions, as petitioners now request, would be a peculiarly inappropriate and unwarranted exercise for this Court.

III. The Court Of Appeals Properly Found That, As A Factual Matter, Royal Crown Presented Neither An "Unclean Hands" Nor A *Pari Delicto* Defense At Trial.

Petitioner's argument concerning alleged "unclean hands" and *pari delicto* defenses (Pet. 33-39) presents no issue of law for this Court's consideration. The legal principles applicable to such defenses are already well established. In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 214 (1951), this Court held that plaintiff's participation in illegal activity unrelated to alleged anticompetitive conduct by

defendant would not bar plaintiff's antitrust action. Similarly, in *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 138-141 (1968), the Court ruled that plaintiff's own participation in a challenged restraint (*in pari delicto*) is equally unavailable as an affirmative defense.

In its opinion below, the court of appeals did not disregard or question the validity of these precedents. Instead, based on a full review of the extensive evidentiary record, the court of appeals correctly determined that, as a factual matter, no "unclean hands" or *pari delicto* defenses had been presented at trial.

With respect to *Perma Life,* the court of appeals "carefully reviewed the record and pay[ed] particular attention to the testimony and argument that [petitioners] contend tends to establish and emphasize the *pari delicto* defense" (Pet. App. A 15). Indeed, after oral argument, the court of appeals specifically requested supplemental briefs from the parties providing "volume, page and line references to the record and reporter's transcript at which appears the evidence [petitioners] describe as presentation of the *pari delicto* defense" (Order, dated August 17, 1979). Based on this careful review, the court of appeals' concluded:

> Here, the jury was never presented with evidence or argument that [petitioners'] acquiesence and participation in, and advocacy of, the territorial restrictions contained in the Royal Crown franchise agreement was somehow improper and therefore precluded recovery on the antitrust claim. Moreover, the [trial] court properly refused to give an *in pari delicto* instruction. Under such circumstances, we reject [petitioners'] contention

that an improper *pari delicto* defense was presented. (Pet. App. A 16-17.)

The court of appeals similarly determined that, consistent with the *Kiefer-Stewart* doctrine, Royal Crown had not, in fact, been permitted to raise an "unclean hands" affirmative defense based on petitioners' trucking arrangements (Pet. App. A 17-22). Evidence concerning shipping rates and methods was admitted at trial solely on the question of lost net profits, a matter petitioners themselves had put in issue (*id.* at 17-18).[12] Both the argument of counsel and the trial court's detailed instructions on damage calculations (*id.* at 18-19) properly limited the jury's consideration of such evidence to the lost profits issue. As the court of appeals summarized:

> After careful review of the record, we find that the jury was never informed by the district court's instructions, by Royal Crown's closing agrument, or by Royal Crown's manner of presenting the evidence, that the illegality of the trucking arrangement might constitute a complete affirmative defense. (Pet. App. A 19-20.)

The court of appeals thus correctly rejected petitioners' "unclean hands" and *pari delicto* arguments based on the particular facts of this litigation. Petitioners' request that this Court now reexamine the entire evidentiary record of the seven-week trial below to validate the court of appeals' factual determinations should be declined.

[12] Thus, Royal Crown's evidence established (a) that petitioners' "gypsy" truckers charged considerably less than the ICC prescribed minimum rate, (b) that the ICC would have acted promptly to halt the unauthorized shipments, and (c) that projected shipping costs in petitioners' net profit calculations would have to be adjusted upward to reflect these eventualities.

IV. The Court Of Appeals Correctly Affirmed The Jury's Verdicts And Awards Of Compensatory Damages On Royal Crown's Counterclaims.

At trial, Royal Crown presented substantial evidence of a conspiracy among petitioners designed to injure Royal Crown's business by disrupting the Royal Crown trademark licensing system (Pet. App. A 5). Although Royal Crown demonstrated some $18,000 to $20,000 of actual damages due to petitioners' actions, it voluntarily scaled down the amount of compensatory damages claimed to $500 per party on each counterclaim (*id.* at 23).

Consistent with Section 4 of the Clayton Act, 15 U.S.C. § 15, the trial court properly instructed the jury that proof of actual injury was necessary for Royal Crown to prevail on its antitrust claims. These instructions, which are reviewed in detail in the court of appeals' decision (*id.* at 23-24), explicitly required the jury to "determine whether the conspiracy proximately caused injury to Royal Crown . . . and, if so, the amount of damages." The jury evaluated the evidence in light of this charge and awarded Royal Crown the full amount of compensatory damages requested (*i.e.*, $8,000 after trebling).

Contrary to petitioners' present argument (Pet. 40-42), the trial court thus did not instruct the jury that it could award Royal Crown "nominal damages" irrespective of whether or not actual injury had been sustained. As the court of appeals found:

> The term ["nominal damages"] was used merely as a shorthand expression denoting that Royal Crown had limited its request for damages due to actual injury to a nominal amount; it was not used in the technical legal sense to mean damages

awardable without proof of actual injury. (Pet. App. A 24.)

Because the jury is presumed to have followed its instructions, it had to find that Royal Crown was actually injured before returning a verdict in any amount (*id.*).

Moreover, once actual injury arising from an antitrust violation is established, there is no legal impediment to an award of damages which is merely small or nominal in size. Numerous recent federal court decisions expressly confirm that the award of antitrust damages which may be nominal in amount is entirely appropriate. *E.g., Morning Pioneer, Inc.* v. *Bismarck Tribune Co.*, 493 F.2d 383, 390 (8th Cir.) (affirming award of three dollars trebled demages), *cert. denied*, 419 U.S. 836 (1974); *Knutson* v. *Daily Review, Inc.*, 468 F.Supp. 226, 240 (N.D. Cal. 1979) (awarding nominal damages of three dollars); *Newberry* v. *Washington Post Co.*, 438 F.Supp. 470, 483 (D.D.C. 1977) (awarding nominal treble damages of nine dollars).

Accordingly, petitioners' "nominal damages" argument was properly rejected by the court of appeals as inconsistent with the trial record; *i.e.*, the jury was specifically instructed that it must find actual injury before returning a verdict for Royal Crown on its counterclaims. The court of appeals' factual determination was correct and presents no issue warranting further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES H. WALLACE, JR.
JOHN B. WYSS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5140

Attorneys for Respondent

KIRKLAND & ELLIS
Washington, D.C.

W. NOLAN MURRAH, JR.
General Counsel
Royal Crown Companies, Inc.
Atlanta, Georgia 30346

Of Counsel

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